

³ The Board notes that, following the December 3, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether OWCP appellant received an overpayment of compensation in the amount of \$6,905.83 for the period October 12, 2018 through January 5, 2019 because she continued to receive disability compensation following her return to work; (2) whether it properly found that appellant was at fault in the creation of the overpayment and, therefore, precluded from waiver of recovery; and (3) whether OWCP properly determined that appellant abandoned her request for a prerecoupment hearing.

FACTUAL HISTORY

On August 1, 2017 appellant, then a 24-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on July 17, 2017 she sustained a left knee injury when her foot hit the bottom of a trailer and her knee buckled back while in the performance of duty. She stopped work on July 31, 2017. OWCP initially accepted the claim for left knee contusion, sprain, effusion, and later expanded the acceptance of the claim to include a left knee lateral meniscus tear. It paid appellant wage-loss compensation on the supplemental rolls as of September 17, 2017 and on the periodic rolls as of November 12, 2017.

OWCP advised appellant on September 28, 2017 that she was expected to return to work as soon as she was able, and it was her responsibility to advise the employing establishment once her physician found her capable of returning to work. It also advised appellant that once she returned to work she should notify OWCP and return payment for any period worked to prevent an overpayment of compensation. OWCP advised appellant that, if she worked during any portion of the covered period and compensation payments were received *via* either paper check or for payments sent by electronic funds transfer (EFT), she was to return the payment to OWCP even if she had already advised OWCP that she was working.

The employing establishment offered appellant a full-time modified assignment (limited duty) as a mail processing clerk on October 4, 2018, which appellant accepted on October 10, 2018.

In an e-mail to OWCP dated January 23, 2019, a health and resource management specialist at the employing establishment noted that appellant had returned to work on October 12, 2018.

In an automated compensation payment system (ACPS) worksheet dated January 28, 2019, OWCP calculated that appellant's overpayment amount for the period October 12, 2018 through January 5, 2019 was \$6,905.83. It noted that appellant was paid \$158.86 for the period October 12 through 13, 2018 and \$2,248.99 for each subsequent 28-calendar-day period through January 5, 2019.

In a preliminary overpayment determination dated July 8, 2019, OWCP advised appellant that an overpayment of compensation in the amount of \$6,905.83 had been created because she returned to work full time on October 12, 2018, but continued to receive wage-loss compensation through January 5, 2019. Appellant's 28-day net compensation payment for September 16 through October 13, 2018 was \$2,224.07, while her 28-day net compensation payment for the three

subsequent 28-day periods through January 5, 2019 was \$2,248.99. OWCP provided its computation of the amount of the overpayment for this period, dividing her 28-day compensation during the relevant periods by 28 to arrive at a daily rate, then multiplying the daily rate by the number of days appellant was overpaid. It made the preliminary finding that appellant was at fault in the creation of the overpayment, as she accepted payments she knew or should have known to be incorrect. OWCP advised appellant that she received a paper compensation check with the printed period of payment and the amount paid and she should have reasonably known that the payment was incorrect because the dates overlapped with the period she worked; therefore, she accepted a payment she knew or reasonably should have known was incorrect. It afforded appellant 30 days to submit additional evidence and argument and to request a hearing.

On August 2, 2019 appellant requested a prerecoupment hearing on an overpayment action request form and contested the fact of the overpayment, the amount of the overpayment, and the preliminary finding of fault, requesting a waiver. She completed an overpayment recovery questionnaire (Form OWCP-20) and explained that she had reported her return to full-time work in October 2018. Appellant noted that it took so long to “get my checks started” she believed the checks were money she was due.

In a letter dated October 2, 2019, OWCP’s hearing representative notified appellant that a telephonic hearing was scheduled for Tuesday, November 19, 2019 at 2:30 p.m. Eastern Standard Time (EST). The notice provided the appropriate toll-free number and passcode for the hearing. OWCP’s hearing representative mailed the notice to appellant’s last known address of record. Appellant did not appear for the hearing.

By decision dated December 3, 2019, OWCP determined that appellant had abandoned her request for a prerecoupment hearing. It indicated that appellant had received 30 days advanced written notice of the hearing scheduled for November 19, 2019, but that she failed to appear. OWCP further noted that there was no indication in the record that appellant had contacted it either prior to, or within 10 days after the hearing to request a postponement or provide an explanation to OWCP for her failure to appear at the hearing. Consequently, appellant was deemed to have abandoned her request for an oral hearing.

OWCP also finalized the preliminary overpayment determination that an overpayment of compensation in the amount of \$6,905.83 for the period October 12, 2018 through January 5, 2019 was created. It found that appellant was at fault in the creation of the overpayment and required recovery in full.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA⁴ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.⁵ Section 8129(a) of FECA provides, in pertinent part, that when an overpayment has been made to an individual under this subchapter because of an error of fact or

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Id.* at § 8102(a).

law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.⁶

A claimant is not entitled to receive temporary total disability and actual earnings for the same period.⁷ OWCP regulations provide that compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$6,905.83 for the period October 12, 2018 through January 5, 2019 because she continued to receive disability compensation following her return to work.

OWCP paid appellant wage-loss compensation for disability on the periodic rolls. The evidence reflects that appellant returned to work, full time, on October 12, 2018. Appellant continued to receive wage-loss compensation through January 5, 2019. A claimant is not entitled to receive temporary total disability benefits and actual earnings for the same time period.⁹ Accordingly, the Board finds that appellant received an overpayment of compensation.¹⁰

The record shows that OWCP calculated that, from October 12, 2018 through January 5, 2019, appellant received \$6,905.83 in total net compensation, but was not entitled to any compensation during this time period. OWCP explained that appellant was paid \$158.86 for the period October 12 through 13, 2018 and \$2,248.99 for each subsequent 28-calendar day period through January 5, 2019.¹¹ The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$6,905.83 for the period October 12, 2018 through January 5, 2019.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA provides that adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against

⁶ *Id.* at § 8129(a).

⁷ *See M.S.*, Docket No. 16-0289 (issued April 21, 2016); *D.B.*, Docket No. 15-0258 (issued February 1, 2016).

⁸ *See C.V.*, Docket No. 16-0986 (issued September 1, 2016); 20 C.F.R. § 10.500.

⁹ *Supra* note 7.

¹⁰ *J.M.*, Docket No. 17-1574 (issued February 8, 2018).

¹¹ The daily rate for the period September 16 through October 13, 2018 was \$79.43. The daily rate for the periods during October 14, 2018 through January 5, 2019 was \$80.32.

equity and good conscience.¹² No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.¹³

On the issue of fault 20 C.F.R. § 10.433(a) provides that an individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.¹⁴

With respect to whether an individual is without fault, section 10.433(b) of OWCP's regulations provide that whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.¹⁵

Even if an overpayment resulted from negligence by OWCP, this does not excuse the employee from accepting payment, which the employee knew or should have been expected to know she was not entitled.¹⁶

ANALYSIS -- ISSUE 2

The Board finds that the case is not in posture for decision.

In order for it to establish that appellant was at fault in the creation of the overpayment of compensation, OWCP must establish that, at the time appellant received the compensation check in question, she knew or should have known that the payment was incorrect.¹⁷

The Board has explained that when a claimant returns to work and subsequently receives a compensation check in the mail covering a period of employment, if he or she knows or should have known that they were not entitled to such compensation, but decides nonetheless to cash or deposit the check, the cashing or depositing of the check establishes fault.¹⁸

On September 28, 2017 OWCP advised appellant that she was to immediately inform it of any return to work. It also advised appellant that if she continued to receive wage-loss

¹² 5 U.S.C. § 8129(b).

¹³ *Gregg B. Manston*, 45 ECAB 344, 354 (1994).

¹⁴ 20 C.F.R. § 10.433(a). *See Kenneth E. Rush*, 51 ECAB 116, 118 (1999).

¹⁵ *Id.* at § 10.433(b).

¹⁶ *Diana L. Booth*, 52 ECAB 370 (2001).

¹⁷ *J.H.*, Docket No. 17-0592 (issued May 1, 2018); *Linda E. Padilla*, 45 ECAB 768, 772 (1994).

¹⁸ *See J.H., id.*; *William F. Salmonson*, 54 ECAB 152 (2002).

compensation by check, but had worked during any period covered by a check, she had to return the check, even if she had reported her return to work to OWCP. Thus, appellant should have known that she could not receive wage-loss compensation by check after her return to work.

The Board finds that as the checks in question do not appear in the record, it is unable to verify that the checks identified the period for which compensation was paid and, therefore, that appellant should have known that the checks were compensation payments for the period following which she had returned to work.

Accordingly, the Board finds that the case must be remanded to OWCP. OWCP shall scan copies of the checks issued to appellant for the period October 12, 2018 through January 5, 2019 into the case record. OWCP shall thereafter determine whether appellant knew or should have known that she received an overpayment of compensation. OWCP shall then issue a new preliminary overpayment determination regarding the issue of fault, with an overpayment action request form, a Form OWCP-20 instructions for appellant to provide supporting financial documentation. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.¹⁹

CONCLUSION

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$6,905.83 from October 12, 2018 through January 5, 2019. The Board further finds, however, that this case is not in posture for decision as to whether appellant was at fault in the creation of the overpayment.

¹⁹ In light of the Board's disposition of Issue 2, Issue 3 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the December 3, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 4, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board